

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES S. TATE, M.D.,

Plaintiff,

v.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA, *et al.*,

Defendants.

Case No. 2:08-cv-1183-LDG (GWF)

ORDER

Following an altercation involving the plaintiff, Dr. James Tate, and the parent and grandparent of a minor patient at University Medical Center of Southern Nevada (UMC), Dr. John Fildes removed Tate from the Trauma Department call schedule. Tate subsequently brought this suit against Fildes, UMC, Kathleen Silver, Dr. John Ellerton, Dr. Marvin Bernstein, the Medical and Dental Staff of UMC (Medical Staff), and each of the County Commissioners.¹

Previously, the Court dismissed several of Tate's claims with prejudice and several claims without prejudice. Tate moves for leave to file a Third Amended Complaint (#115) "to address certain pleading insufficiencies which this Court found in its Order." The

¹ It would appear Tate is suing the county commissioners in their capacity as members of the Board of Trustees for UMC.

1 defendants oppose the motion (## 121, 124) only to the extent that Tate's proposed Third
2 Amended Complaint adds an additional claim not previously alleged.

3 Medical Staff, Ellerton, Fildes, and Bernstein (the "Doctor Defendants") move for
4 summary judgment as to Tate's second, tenth, and eleventh claims (#125).² Tate opposes
5 the motion (#127), and the Doctor Defendants have filed a reply (#130).

6 UMC, the County Commissioners, and Silver (the "UMC Defendants") move for
7 summary judgment as to Tate's second, sixth, tenth, eleventh and twelfth claims (#126).³
8 Tate opposes the motion (#132), and the UMC Defendants have filed a reply (#133).

9 Motion for Summary Judgment

10 In considering a motion for summary judgment, the court performs "the threshold
11 inquiry of determining whether there is the need for a trial—whether, in other words, there
12 are any genuine factual issues that properly can be resolved only by a finder of fact
13 because they may reasonably be resolved in favor of either party." *Anderson v. Liberty*
14 *Lobby, Inc.*, 477 U.S. 242, 250 (1986). To succeed on a motion for summary judgment,
15 the moving party must show (1) the lack of a genuine issue of any material fact, and (2)
16 that the court may grant judgment as a matter of law. Fed. R. Civ. Pro. 56(c); *Celotex*
17 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

18 A material fact is one required to prove a basic element of a claim. *Anderson*, 477
19 U.S. at 248. The failure to show a fact essential to one element, however, "necessarily
20 renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

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23 ² These claims are identical in both Tate's Second Amended Complaint and his
24 proposed Third Amended Complaint. Accordingly, the Court may address the Doctor
25 Defendants' motion on its merits prior to considering Tate's motion for leave to file the
26 proposed Third Amended Complaint.

³ For the same reasons noted in footnote 2, the Court may address the UMC
Defendants' motion on its merits prior to considering Tate's motion for leave to file the
proposed Third Amended Complaint.

1 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after
2 adequate time for discovery and upon motion, against a party who fails to make a showing
3 sufficient to establish the existence of an element essential to that party’s case, and on
4 which that party will bear the burden of proof at trial.” *Id.* “Of course, a party seeking
5 summary judgment always bears the initial responsibility of informing the district court of
6 the basis for its motion, and identifying those portions of ‘the pleadings, depositions,
7 answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which
8 it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S.
9 at 323. As such, when the non-moving party bears the initial burden of proving, at trial, the
10 claim or defense that the motion for summary judgment places in issue, the moving party
11 can meet its initial burden on summary judgment “by ‘showing’—that is, pointing out to the
12 district court—that there is an absence of evidence to support the nonmoving party’s case.”
13 *Celotex*, 477 U.S. at 325. Conversely, when the burden of proof at trial rests on the party
14 moving for summary judgment, then in moving for summary judgment the party must
15 establish each element of its case.

16 Once the moving party meets its initial burden on summary judgment, the non-
17 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. Pro.
18 56(e). As summary judgment allows a court “to isolate and dispose of factually
19 unsupported claims or defenses,” *Celotex*, 477 U.S. at 323-24, the court construes the
20 evidence before it “in the light most favorable to the opposing party.” *Adickes v. S. H.*
21 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,
22 will not defeat a well-founded motion. Fed. R. Civ. Pro. 56(e); *Matsushita Elec. Indus. Co.*
23 *v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

1 Factual Background

2 As alleged by Tate in his complaint, in 1991, he entered into a Trauma Services
3 [sic]⁴ Agreement (TSA) with UMC to provide trauma surgery services to UMC, and provided
4 those services until August 8, 2008.

5 On August 5, 2008, Tate found himself in a “situation”⁵ with the father and
6 grandmother of a minor patient. In his complaint, he alleges that they were verbally hostile
7 and aggressive, that he removed himself from the room, that they came after him in a fast
8 and aggressive manner, stopping an inch away from him, that he placed his hands on the
9 father and pushed him back “with the intent to create some space,” and subsequently did
10 the same with the grandmother. After a member of the nursing staff intervened and pulled
11 the father and grandmother away, Tate finished his departure.

12 On August 8, Silver (whom Tate alleges is an employee of UMC) sent Fildes (whom
13 Tate alleges is UMC’s Medical Director of Trauma Services) a letter requesting that he
14 remove Tate from the Trauma Department call schedule. On that same date, Fildes sent
15 Tate a letter stating that, effective immediately, he would be removed from the Trauma
16 Department call schedule indefinitely. He has not worked as a trauma surgeon at UMC
17 since that date.

18 Tate further conceded, in his complaint, that after his removal from the call
19 schedule, he possessed his clinical privileges to practice medicine at UMC.⁶

21 ⁴ Tate references the TSA in both his Second Amended Complaint and
22 proposed Third Amended Complaint, and relies upon it to assert several claims. A copy of
23 the TSA, signed by Tate, has been submitted to the Court. The document is titled “Trauma
Surgery Agreement.”

24 ⁵ Second Amended Complaint, paragraph 46.

25 ⁶ As noted by the Ninth Circuit in its Order dismissing Tate’s appeal as moot,
26 Tate “has since lost all of his clinical privileges at the hospital.” Tate has challenged the
subsequent loss of his clinical privileges in a separate lawsuit. The present suit challenges
his removal from the call schedule.

1 Procedural Background

2 In his first claim, brought pursuant to 42 U.S.C. §1983, Tate alleged that all
3 defendants violated his Fourteenth Amendment rights. The Court granted summary
4 judgment in favor of all defendants. Of particular relevance to the current motions for
5 summary judgment, the Court stated: “Tate’s complaint permits only the inference that
6 Silver and Fildes limited one of several avenues by which Tate could exercise his privilege
7 to admit patients, but did not limit the privilege itself. As the constitutionally protected
8 property interest lies in the clinical privilege, rather than an employment position that
9 provides one avenue to exercise those privileges, the court finds that the first claim must be
10 dismissed with prejudice as to each defendant.”

11 Tate’s second claim for relief, brought against all defendants, seeks a declaration
12 regarding and injunctive relief requiring reversal of the de facto suspension, alteration or
13 modification of Plaintiff’s clinical privileges.

14 In his sixth claim for relief, Tate alleged that all defendants breached the TSA. As
15 UMC is the only defendant that is a party to the TSA, the Court dismissed the claim, with
16 prejudice, as to each defendant except UMC.

17 The Court construed Tate’s tenth claim for relief, asserted against all defendants, as
18 alleging that the defendants breached the implied covenant of good faith and fair dealing in
19 two different contracts: (a) the TSA, and (b) a contract consisting of the Medical Staff’s
20 Bylaws, Credentialing Manual and other documents governing defendants’ treatment of
21 Tate’s clinical privileges (hereinafter “Bylaws”). To the extent that Tate’s tenth claim rested
22 upon the TSA, the Court dismissed the claim, with prejudice, as to each defendant except
23 UMC. The Court did not address the merits of Tate’s tenth claim to the extent it rested
24 upon a contract consisting of the Bylaws, Credentialing Manual, and other documents, as
25 the defendants had not raised the issue in moving for dismissal.

1 In his eleventh claim for relief, asserted against all defendants, Tate alleged the
2 defendants were negligent in failing to follow the procedures set forth in the Medical Staff's
3 Bylaws, Credentialing Manual and other documents governing defendants' treatment of
4 Tate's clinical privileges. The Court denied the moving defendants' argument that, as Tate
5 had alleged they were parties to a contract consisting of these documents, he was limited
6 to only bringing a contract claim against them. The Court indicated that Tate could
7 proceed on the alternative theory that the moving defendants were not a party to a contract
8 created by these documents.

9 Tate's twelfth claim for relief alleges negligence against the UMC defendants for
10 breaching a duty to provide a safe work environment.

11 Analysis

12 At their core, the Defendants' motions argue that Tate's second, tenth, and eleventh
13 claims each rest upon his underlying premise that his clinical privileges at UMC were
14 suspended by his removal from the UMC Trauma Department call schedule. The
15 defendants note, correctly, that the Court previously rejected this premise. In dismissing
16 Tate's §1983 claim with prejudice, the Court determined that Tate's removal from the call
17 schedule, while suspending an employment opportunity providing one avenue by which he
18 could exercise his clinical privileges, was not a suspension or revocation of his clinical
19 privileges.

20 Tate's oppositions and the allegations of his complaint confirm that these claims rest
21 upon his argument that his clinical privileges at UMC were suspended by his removal from
22 the UMC Trauma Department call schedule. As summarized by Tate, he argues in support
23 of this second claim for relief that "as Defendants failed to abide by mandatory and well-
24 established policies denying the Plaintiff a pre-deprivation hearing, they violated the
25 Plaintiff's constitutional rights." Opposition to Doctor Defendants' Motion, at 23 (emphasis
26 added). Tate's oppositions acknowledge that his second claim seeks injunctive and

1 declaratory relief based upon the §1983 violation he alleged in his first claim. Thus, as
2 suggested by the defendants, the Court's dismissal of Tate's first cause of action with
3 prejudice necessarily requires that his second claim also be dismissed with prejudice.

4 As to the claim for breach of the implied covenant of good faith and fair dealing,
5 Tate argues that "the lack of a constitutionally-protected property interest does not
6 necessarily foreclose the possibility of a legally-binding agreement between the Plaintiff
7 and the Defendants." Opposition to Doctor Defendants' Motion, at 23. Tate then
8 extensively argues that the Bylaws created a contract between him and the defendants
9 governing his clinical privileges. Tate's argument in opposition is consistent with the
10 allegations of his complaint, in which he alleges that the Defendants "failed to follow the
11 procedures set forth in the Defendants' Bylaws, Credentialing Manual and other governing
12 documents when they suspended Plaintiff's privileges." Second Amended Complaint,
13 paragraph 169.

14 Further, as Tate alleges in his eleventh cause of action for negligence, "Defendants
15 had a duty of care to act reasonably and follow the Bylaws, Credentialing Manual and other
16 governing documents in their treatment of Plaintiff's privileges." Id., at paragraph 176. He
17 further alleges: "Defendants failed to follow the procedures set forth in the Defendants'
18 Bylaws, Credentialing Manual and other governing documents when they suspended
19 Plaintiff's privileges, thereby breaching their duty to Plaintiff."

20 The allegations of Tate's claims and his arguments in opposition to the pending
21 motions for summary judgment establish that, as suggested by the Defendants, his tenth
22 and eleventh claims for relief also rest upon the same premise that his removal from the
23 Trauma Department call schedule was a de facto suspension or revocation of his clinical
24 privileges.

25 The Court has rejected that argument. Regardless of the theory of recovery he
26 advances, Tate conceded in his complaint that (as relevant to this complaint) he possessed

1 his clinical privileges at UMC after his removal from the Trauma Department call schedule.
2 While the removal from the call schedule ended one avenue of employment opportunity by
3 which Tate could exercise his clinical privileges, the removal was not a suspension or
4 revocation of his clinical privileges. Tate cannot maintain a claim that defendants breached
5 either a covenant of good faith and fair dealing or a duty of care in suspending his clinical
6 privileges when, as he concedes in his own complaint, he possessed his clinical privileges
7 after his removal from the call schedule. The Court will dismiss the second, tenth, and
8 eleventh claims with prejudice.

9 Discretionary-Act Immunity

10 The Doctor Defendants further argue that they are entitled to discretionary-act
11 immunity, pursuant to Nev. Rev. Stat. 41.032, as to Tate's second, tenth, and eleventh
12 causes of action.

13 While Tate argues that the Doctor Defendants are neither state employees nor
14 immune contractors, he does not offer any argument that they are not, under the
15 circumstances he alleges in his complaint, state officers.

16 Tate further argues that the Doctor Defendants are not entitled to discretionary-
17 immunity because the Bylaws required that they provide him with "a 'fair' hearing once a
18 physician's privileges are limited or terminated." Again, the argument fails because, Tate
19 conflates the loss of an employment opportunity caused by his removal from the call
20 schedule with the loss of clinical privileges. As conceded by Tate, his clinical privileges
21 were not limited or terminated. Rather, he was removed from the Trauma Department call
22 schedule, a loss of an employment opportunity to exercise the clinical privileges that he
23 possessed.

24 The UMC Defendants also assert that they are entitled to discretionary-act immunity
25 as to Tate's second, tenth, eleventh, and twelfth causes of action.

1 To the extent that Tate raises the same argument that the Bylaws required a fair
2 hearing, his argument fails for the same reasons. To the extent that Tate argues that
3 discretionary-immunity cannot be applied to his claim for breach of the TSA, the Court
4 would note that UMC did not assert immunity as to Tate's sixth claim for breach of contract.
5 The Court will dismiss Tate's twelfth cause of action, alleged against the UMC Defendants,
6 with prejudice as they are entitled to discretionary-act immunity.

7 Punitive Damages

8 The UMC Defendants move for summary judgment to the extent that Tate seeks
9 punitive damages on his claims for breach of contract claim and breach of the implied
10 covenant of good faith and fair dealing. Tate does not offer any argument that he is
11 entitled to punitive damages on his breach of contract claim. He argues that he can seek
12 punitive damages on his claim for breach of the implied covenant of good faith and fair
13 dealing because it is a derivative of both contract and tort law, and that such an award is
14 appropriate where a party in a superior position has engaged in grievous and perfidious
15 misconduct.

16 Tate does not, however, cite to any allegation of his complaint and has not
17 submitted any evidence of grievous and perfidious misconduct.

18 The Court will grant summary judgment to the extent that Tate seeks punitive
19 damages arising from his claim for breach of contract and breach of the implied covenant
20 of good faith and fair dealing.

21 Breach of Contract & Breach of Covenant of Good Faith and Fair Dealing

22 UMC argues that Tate's breach of contract and breach of the covenant of good faith
23 and fair dealing claims must be dismissed because the TSA lacks any language requiring
24 that it employ Tate as a trauma on-call surgeon. Rather, the language of the TSA requires
25 UMC to reimburse Tate if called to the hospital. As Tate has not alleged that he provided
26 services for which he was not paid, he has not shown a breach of the TSA.

1 While Tate summarily asserts that UMC breached the TSA on August 8, 2008, by
2 removing him from the call schedule, he does not identify the language, provision, or term
3 of the TSA violated by his removal. Accordingly, dismissal of these claims with prejudice is
4 appropriate as Tate has not shown that UMC breached the TSA.

5 Motion for Leave to File Third Amended Complaint

6 As Tate's proposed Third Amended Complaint was prepared prior to this Order, and
7 as the proposed complaint includes claims that are dismissed with prejudice by this Order,
8 the Court will deny leave to file the Third Amended Complaint as proposed.


9 The Court will, however, grant Tate leave to file a modified version of his proposed
10 Third Amended Complaint that (a) reflects that the second, sixth, tenth, eleventh, and
11 twelfth causes of action have been dismissed with prejudice, and (b) that does not include
12 the proposed fourteenth cause of action.

13 Therefore, for good cause shown,

14 THE COURT **ORDERS** that Defendants' Motions for Summary Judgment (## 125,
15 126) are GRANTED. Plaintiff's second, sixth, tenth, eleventh, and twelfth causes of action
16 are DISMISSED with prejudice.

17 THE COURT FURTHER **ORDERS** that Plaintiff's Motion for Leave to File Third
18 Amended Complaint (#115) is GRANTED as follows: Plaintiff may file a modified version of
19 his proposed Third Amended Complaint, which modifications will (a) reflect that the
20 second, sixth, tenth, eleventh, and twelfth causes of action have been dismissed with
21 prejudice, and (b) delete the proposed fourteenth cause of action.

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23 DATED this 10 day of September, 2010.

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25 
26 Lloyd D. George
United States District Judge